

87-1740

No.

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1987

STATE OF NEW JERSEY,

Respondent,

v.

JOSEPH P. POLLIO,

Petitioner.

PETITION OF JOSEPH P. POLLIO FOR WRIT OF
CERTIORARI TO THE SUPERIOR COURT OF
NEW JERSEY, APPELLATE DIVISION

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On the Brief



QUESTIONS PRESENTED

1. Whether the original jury, having deliberated 8 hours 50 minutes over two days in a case involving one incident of alleged sexual contact in which the primary issue was the credibility of the victim as against that of the defendant, had reached an advanced stage of deliberations so that the likelihood that deliberations would truly begin anew was so remote as to foreclose juror substitution?
2. If the juror substitution was proper under the facts presented in this case, did the minimal period of the reconstituted jury's deliberations (*i.e.*, 2 hours 9 minutes), when compared to the period of the original jury's deliberations (*i.e.*, 8 hours 50 minutes), demonstrate that defendant was, in fact, prejudiced by the substitution?

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STATE OF NEW JERSEY,

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v.

JOSEPH P. POLLIO,

Petitioner.

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PETITION OF JOSEPH P. POLLIO FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

—0—

Petitioner Joseph P. Pollio ("defendant") respectfully prays that a writ of *certiorari* be issued to review the judgment and opinion of the Superior Court of New Jersey, Appellate Division ("Appellate Division") entered in this matter on October 13, 1987.

—0—

OPINION BELOW

The opinion of the Appellate Division is unreported. It is set out in the appendix. (App. 1-3).

JURISDICTIONAL STATEMENT

The judgment and opinion of the Appellate Division was entered on October 13, 1987. On February 17, 1988, the Supreme Court of New Jersey entered its order denying defendant's petition for certification. (App. 4). This petition for writ of *certiorari* has been filed within 60 days thereafter pursuant to 28 U.S.C. § 2102(d) and Supreme Court Rule 20.1. The jurisdiction of this court is invoked in accordance with 28 U.S.C. § 1257(3).

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CONSTITUTIONAL PROVISIONS INVOLVED

This case involves Amendment VI of the United States Constitution, which provides as follows:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for defence.

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STATEMENT OF THE CASE

On May 16, 1986 after a jury trial before the Superior Court of New Jersey, Law Division, Criminal Part, defendant was found guilty of sexual assault (N.J.S.A. 2C:14-2c(1)) and criminal restraint (N.J.S.A. 2C:13-2a) and was

acquitted of aggravated sexual assault (*N.J.S.A. 2C:14-2a (6)*). He was sentenced on September 23, 1986 to concurrent presumptive custodial terms of seven and four years respectively.

The trial below commenced on May 7, 1986 and, after four and one-half days of testimony, the original jury commenced its deliberations at 2:55 p.m. on May 14, 1986. At that time, the two alternate jurors were sequestered apart from the jury pending the completion of the deliberations.

The original jury deliberated for 8 hours 50 minutes over a period of two days without reaching a verdict. Prior to the commencement of deliberations on the third day, the trial judge granted the State's motion to discharge one of the jurors for cause over defendant's objection.¹

The discharged juror was replaced by one of the alternates and, after the defendant's motion for a mistrial was denied, the reconstituted jury was directed to begin its deliberations anew.² It deliberated only 2 hours 9 minutes before announcing its verdict.

¹ During the evening of the second day of deliberations, the juror approached a member of defense counsel's firm at a bowling alley and asked the attorney if he would answer a legal question for him. The juror was unaware that the attorney was a member of defense counsel's firm. However, the attorney immediately realized that the juror was sitting on this case and terminated the conversation. Based upon the foregoing, the trial judge granted the State's motion to discharge the juror.

² In addition to his trial objections, defendant presented the juror substitution issues to the Appellate Division. (See App. 2-3).

The chronology of the deliberations is as follows:

ORIGINAL JURY

May 14, 1986

Commencement of deliberations	2:55 p.m.
Jury excused for the day	4:55 p.m.
Elapsed time	2 hours 0 minutes

May 15, 1986

Resumption of deliberations	9:11 a.m.
Request for instructions	11:35 a.m.
Elapsed time	2 hours 24 minutes
Resumption of deliberations	11:40 a.m.
Jury excused for lunch	12:30 p.m.
Elapsed time	0 hours 50 minutes
Resumption of deliberations	1:42 p.m.
Jury excused for the day	5:18 p.m.
Elapsed time	<u>3 hours 36 minutes</u>
Total time of deliberations	8 hours 50 minutes

RECONSTITUTED JURY

May 16, 1986

Commencement of deliberations	10:13 a.m.
Announcement of verdict	12:24 p.m.
Elapsed time	<u>2 hours 9 minutes</u>
Total time of deliberations	2 hours 9 minutes

ARGUMENT

"It is of course settled that in all serious criminal cases, state or federal, the sixth and fourteenth amendments to the [federal] Constitution entitle the accused to a trial by jury. *Johnson v. Duckworth*, 650 F.2d 122, 124 (7th Cir. 1981) (citing *Duncan v. Louisiana*, 391 U.S. 145, 156, 88 S.Ct. 1444, 1451, 20 L.Ed.2d 491, 500 (1968)). "To determine whether a certain feature of a jury system comports with constitutional requirements, 'the relevant inquiry . . . must be the function that the particular feature performs and its relation to the purposes of the jury trial.' *Williams v. Florida*, [399 U.S. 78, 99-100, 90 S.Ct. 1893, 1905, 26 L.Ed.2d 446, 459-60 (1970)]. States [sic] another way, where a state's practice 'presents a . . . threat to preservation of the substance of the jury trial guarantee,' *Burch v. Louisiana* [441 U.S. 130, 138, 99 S.Ct. 1623, 1628, 60 L.Ed.2d 96, 103 (1979)], it must be struck down." *Johnson* at 124.

In *United States v. Phillips*, 664 F.2d 971 (5th Cir. 1981), cert. denied, 475 U.S. 1136 & 1149 U.S. 906, 102 S.Ct. 2965 & 103 S.Ct. 208, 73 L.Ed.2d 1354 & 74 L.Ed.2d 166 (1982), the Fifth Circuit upheld the facial constitutionality of criminal juror substitution under the federal Constitution in reliance upon the reasoning of the California Supreme Court in *People v. Collins*, 17 Cal.3d 687, 131 Cal. Rptr. 782, 552 P.2d 742 (1976), cert. den., 492 U.S. 1077, 97 S.Ct. 820, 50 L.Ed.2d 796 (1977), "that a defendant's fundamental right to a unanimous verdict by a twelve-person jury is not violated where the jury is instructed to begin anew with its entire process of deliberation and where the substituted alternate juror participates

fully in those deliberations.' *Phillips* at 992 n.17 (emphasis added). See *United States v. Kopituk*, 690 F.2d 1289, 1309 (11th Cir. 1982); *United States v. Barone*, 83 F.R.D. 565, 571 n.1 (S.D. Fla. 1979).

The California Supreme Court in *People v. Collins* noted that, although the question in that case was controlled by the state constitution, the result reached satisfied minimum federal constitutional standards. 131 Cal.Rptr. at 785 n.3, 552 P.2d at 745 n.3. The court discussed in depth the defendant's right to trial by jury in the context of substitution of alternates. The court stated that the essential elements of that right included the requirement that the jury consist of twelve persons and that it reach a unanimous verdict. Those elements were viewed by the court as constituent parts of a broader right requiring that each of the twelve jurors engaged in all of that jury's deliberations. The court stated:

The requirement that 12 persons reach a unanimous verdict is not met unless those 12 reach their consensus through deliberations which are the common experience of all of them. It is not enough that 12 jurors reach a unanimous verdict if 1 juror has not had the benefit of the deliberations of the other 11. [Deliberations provide the jury with the opportunity to review the evidence in light of the perception and memory of each member. Equally important in shaping a member's viewpoint are the personal reactions and interactions as any individual juror attempts to persuade others to accept his or her viewpoint. The result is a balance easily upset if a new juror enters the decision-making process after the 11 others have commenced deliberations.] The elements of number and unanimity combine to form an essential element of unity in the verdict. By this we mean that a defendant may not be convicted except by 12 jurors who have heard all

the evidence and the argument and who together have deliberated to unanimity.

Id. 131 Cal.Rptr. at 786, 552 P.2d at 746. The court concluded that a defendant's fundamental right to a unanimous verdict by a twelve-person jury is not violated where the jury is instructed to begin anew with its entire process of deliberation and where the substituted alternate juror participates fully in those deliberations. [Phillips at 992 n.17].

The excerpt above from *Collins* relied upon by the Fifth Circuit has also been adopted by the New Jersey Supreme Court as the "controlling rationale" of its criminal juror substitution rules. *State v. Corsaro*, 107 N.J. 339, 349-50 (June 23, 1987); *State v. Trent*, 79 N.J. 251, 256 (1979). Thus, the same elements of collectivity and mutuality in the jury deliberative process, *i.e.*, the full participation of the alternate juror, are constitutionally required by both the United States and New Jersey Constitutions.

The issues of criminal juror substitution are best understood in the context of "the integrity of jury deliberations and the continuing condition of collectivity and mutuality among the individual jurors as integral aspects of the deliberative process within the jury. *To allow juror substitution at an advanced stage of deliberations would be to sanction a rift in the collectivity and mutuality of the jury's deliberations and to impose precisely the kind of extraneous influence upon the deliberative process that [is] forbidden.*" *Corsaro* at 350-51 (emphasis added).

In both *Corsaro* and *State v. Miller*, 79 N.J. 392 (1978), the New Jersey Supreme Court expressed its concern "that if the jury deliberates for an extended period of time, it will have progressed so far in its deliberations that it will

have reached determinations. Hence, at that juncture, the substituted juror will not have "had the benefit of the deliberations of the other 11, [citations omitted], and may indeed be pressured by the amount of time the jury had deliberated and by the extent of their progress to conform to their findings and verdict." *Corsaro* at 351.

The integrity of jury deliberations is at stake whenever a trial court considers the substitution of a juror after deliberations have commenced. The New Jersey Supreme Court has adopted the following standard for trial courts to apply in order to determine whether juror substitution in a particular case would violate the defendant's federal and state constitutional guarantees of a fair and impartial trial by jury:

What *Miller* and *Trent* contemplate and caution against . . . is the substitution of a juror in a situation where the presumption that jurors follow instructions is unreasonable or untenable. Thus, where the deliberative process has progressed for such a length of time or to such a degree that it is strongly inferable that the jury has made actual fact-findings or reached determinations of guilt or innocence, the new juror is likely to be confronted with closed or closing minds. In such a situation, it is unlikely that the new juror will have a fair opportunity to express his or her views and to persuade others. Similarly, the new juror may not have a realistic opportunity to understand and share completely in the deliberations that brought the other jurors to particular determinations, and may be forced to accept findings of fact upon which he or she has not fully deliberated. [*Corsaro* at 352].

The trial below was not complex. There was only one defendant, one victim, and one incident between them for the jury to consider. Since there were no eyewitnesses

and defendant denied having sexually assaulted or criminally restrained the victim, the deliberations hinged upon the jury's evaluation of their credibility as witnesses. The original jury deliberated over this issue for 8 hours 50 minutes over a period of two days without returning a verdict.

Immediately prior to the commencement of deliberations on the third day, a juror was discharged and replaced by an alternate over defendant's objection in accordance with New Jersey Court Rule 1:8-2(d), which provides, *inter alia*, that "[i]f the alternate jurors are not discharged and if at any time after submission of the case to the jury, a juror dies or a juror is discharged by the court because he is ill or otherwise unable to continue, the court *may* direct the clerk to draw the name of an alternate juror to take the place of the juror who is deceased or discharged." (emphasis added). "The rule is discretionary with the trial court because a situation might arise where it would be unwise to utilize this procedure. The longer the period of time the jury deliberates, the greater the possibility of prejudice should a juror be substituted or replaced." *Miller*, 76 N.J. at 407. See *Corsaro* at 348-49 (quoting *Miller*).

The length of time that the original jury deliberated over the credibility of the victim as against that of defendant, *i.e.*, 8 hours 50 minutes, strongly suggests that many, if not all, of the jurors had made actual fact-findings or reached determinations of guilt or innocence. Therefore, it was unreasonable and an abuse of the trial court's discretion for it to presume that the alternate juror would have a fair opportunity to express his views, persuade others, or understand and share completely in the delib-

erations that brought the other jurors to particular determinations.

Rather, the circumstances were such that the alternate juror was likely to be confronted by closed or closing minds and “be pressured by the amount of time the jury has deliberated and by the extent of their progress to conform to their findings and verdict.” *Corsaro* at 351. Since the original jury had reached an advanced state of its deliberations, “the likelihood that deliberations would truly ‘begin anew’ was so remote . . . as to foreclose juror substitution.” *Id.* at 354.

The reconstituted jury was instructed by the trial court to “[b]egin [its] deliberations again as if [the jury was] now entering the jury room for the first time directly after listening to [the court’s] charge.” However, it returned a verdict after only 2 hours 9 minutes of deliberations, thereby demonstrating the fact that deliberations had *not* “begun anew” and that the substitution had destroyed the collectivity and mutuality of the jury’s deliberations.

In *State v. Lehman*, 108 Wis. 2d 291, 321 N.W.2d 212 (1982), the Wisconsin Supreme Court held that the juror substitution in that case had prejudiced the defendant. Its analysis of the periods of each of the juries’ deliberations was as follows:

The eleven regular jurors in this case were exposed to the influence of the discharged juror for a somewhat longer period of time than they were exposed to the substituted alternate juror. The longer the period of time the jury deliberates before substitution and the shorter the time of jury deliberation after substitution, the greater the possibility of preju-

dice by the substitution. In this case the jury deliberated one hour and thirty-five minutes before substitution and one hour and twenty-one minutes after.

* * *

The total time that the alternate juror spent with the jury in the instant case, one hour and twenty-one minutes, gives no clear indication whether or not the jurors began deliberations anew when the alternate juror joined them or whether they gave conscientious, careful reconsideration to all the facts of the case. [321 N.W.2d at 223-24].

In *Bulls v. United States*, 490 A.2d 197 (D.C. App. 1985), the District of Columbia Court of Appeals held that the defendant had been prejudiced by the juror substitution for the following reasons:

The jury's first deliberation took about 40 minutes; the second, about 68 minutes. From all appearances, the alternate missed a significant portion of the deliberations, and thus we cannot be sure that the reconstituted jury began deliberations anew, untainted by the original participation of juror number seven or by coercion of the late arriving alternate. Absent a voir dire of all the jurors at the time of the substitution, there was no basis for the trial court's conclusion that they had not begun substantial deliberations the first day. [Citations omitted]. Nor did the court instruct the jury, in any event, to begin its deliberations anew. Nor finally did the reconstituted jury's deliberations take long enough to imply a fresh start. [490 A.2d at 202].

Federal Rule of Criminal Procedure 24(c) provides, *inter alia*, that "[a]n alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict." In *United States v. Lamb*, 529 F.2d 1153 (9th Cir. 1975), the Ninth Circuit concluded that

this requirement is mandatory. Therefore, it reversed the reconstituted jury's verdict of guilty because an alternate should not have been available to replace the discharged juror.

However, the Ninth Circuit noted the obvious coercive effect suggested by the dichotomy between the length of the original jury's deliberations and the length of the reconstituted jury's deliberations as follows:

That impermissible coercion upon the alternate juror in this case was manifestly inherent, and that there was not the conscientious, careful reconsideration by the twelve of the newly constituted jury would seem apparent from the fact that, despite the district judge's instruction to the jury to "begin at the beginning," a jury that had required almost four hours to reach its initial verdict [which the judge refused to accept because of his belief that the verdict was inconsistent with his instructions] needed, after being reconstituted, only twenty-nine minutes to find the appellant guilty a second time. (Footnote omitted). [Lamb at 1156].

The original jury below deliberated for 8 hours 50 minutes. The reconstituted jury deliberated 2 hours 9 minutes. However, in both *Lehman* and *Bulls*, the courts found that the defendants were prejudiced by the relatively short and equal periods of their juries' deliberations. Furthermore, the difference in the deliberative periods is analogous to that which was found to be inherently prejudicial by the Ninth Circuit in *Lamb*.

"The most substantial concern about substitution of an alternate juror after deliberations have begun is that the alternate might be coerced by jury members who might have already formulated positions or viewpoints or opin-

ions.” *Phillips*, 664 F.2d at 995. “Extreme precautions” are necessary in order to negate “any possible coercive effect or any undue influence.” *Id.* at 996. In *Lehman*, the Wisconsin Supreme Court summarized these procedures and other critical factors as follows:

In those cases in which courts have concluded that substitution of an alternate juror during jury deliberations may be permitted, one or more of the following factors existed: (1) The trial was of significant duration; (2) the parties expressly and intelligently consented to the substitution; (3) the trial court questioned the alternate juror to determine whether he or she had been prejudiced after the jury began deliberations; (4) the trial court exhaustively questioned each juror as to his or her willingness to begin deliberations anew, giving due consideration to the views of the other jurors, including those of the alternate jurors; and (5) the trial court instructed the jury to set aside prior deliberations and to begin deliberations anew. [321 N.W.2d at 224].

In the instant case, the only precaution taken or factor present is that the trial court instructed the jury to begin its deliberations anew. In the absence of the employment of any of the other potential procedural mechanisms available to the trial court to obviate the potential danger of prejudice to the defendant and given the short duration of the reconstituted jury’s deliberations, it is respectfully submitted that the juror substitution in this case violated defendant’s federal constitutional guarantee of the right to a fair and impartial trial by jury.

CONCLUSION

For all of the foregoing reasons, defendant respectfully submits that a writ of *certiorari* should issue to review the judgment and opinion of the Superior Court of New Jersey, Appellate Division.

Respectfully submitted,

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Joseph P. Pollio

Dated: April 18, 1988

APPENDIX

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-978-86T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOSEPH POLLIO,

Defendant-Appellant.

(Filed Oct. 13, 1987)

Argued September 21, 1987—Decided Oct. 13, 1987.

Before Judges Petrella, Baime and Ashbey.

On appeal from Superior Court of New Jersey, Law Division, Monmouth County.

Steven E. Nelson argued the cause for appellant (Karsic, Stone & Susser, attorneys; Mr. Nelson, on the brief).

Linda K. Calloway, Deputy Attorney General, argued the cause for respondent (W. Cary Edwards, Attorney General, attorney; Ms. Calloway, on the brief).

PER CURIAM

Following a lengthy jury trial, defendant was found guilty of sexual assault (*N.J.S.A. 2C:14-2c(1)*) and criminal restraint (*N.J.S.A. 2C:13-2a*) and was acquitted of aggravated sexual assault (*N.J.S.A. 2C:14-2a(6)*). He was sentenced to concurrent presumptive custodial terms of seven and four years respectively. In addition, defendant

App. 2

ant was assessed penalties totaling \$50 payable to the Violent Crimes Compensation Board.

On appeal, defendant contends that: (1) the trial judge erred when he refused to charge the jury on the lesser-included offenses of sexual contact and simple assault, (2) there was insufficient evidence to support submission of the charge of aggravated sexual assault to the jury, (3) the judge abused his discretion by substituting a juror during the course of deliberations and by refusing to order a mistrial, (4) the judge mistakenly exercised his discretion when he denied the request for a jury view, (5) the verdict was against the weight of the evidence and (6) the judge erred by imposing the presumptive sentence for sexual assault.

Our thorough review of the record convinces us that all of defendant's arguments are clearly without merit. *R.2:11-3(e)(2)*. We affirm. We merely add the following brief comments concerning defendant's argument that the judge erred when he substituted an alternate for a sitting juror during the course of the jury's deliberations.

At the outset, we are entirely satisfied that the judge properly exercised his discretion in excusing the sitting juror. Contrary to the judge's repeated admonitions and instructions, the juror sought outside advice and information concerning the charges. The judge properly questioned the juror out of the presence of the remaining jurors and concluded that the deliberate and flagrant violation of his instructions required immediate action. We are fully convinced that the judge acted wisely and prudently in deciding to excuse the juror.

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We are also convinced that the judge conscientiously exercised his discretion by denying defendant's request for a mistrial and substituting the alternate for the sitting juror. The applicable principles are set forth in *State v. Trent*, 79 N.J. 251 (1979) and *State v. Miller*, 76 N.J. 392 (1978) and need not be repeated here. Suffice it to say, we are convinced, as was the trial judge, that the deliberative process had not progressed for such a length of time or to such a degree that the reconstituted jury could not begin deliberations anew. See *State v. Trent*, *supra*, 79 N.J. at 256-257. Distinguishable on this basis is *State v. Corsaro*, 107 N.J. 339 (1987), where our Supreme Court found plain error in the substitution of an alternate for a sitting juror after a partial verdict had been rendered. *Id.* at 352-354. In sum, we are fully persuaded that the trial judge properly applied R.1:8-2(d) and we, thus, have no occasion to disturb his discretionary determination.

Accordingly, the judgment of convictions is affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

/s/ Jack G. Trubenbach
Clerk of the Appellate Division

SUPREME COURT OF NEW JERSEY

C-600 September Term 1987

27,943

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

JOSEPH POLLIO,

Defendant-Petitioner.

ON PETITION
FOR CERTIFICATION

FILED
FEB 18 1988

To the Appellate Division, Superior Court,

A petition for certification of the judgment of A-978-86T4 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert L. Clifford, Presiding Justice, at Trenton, this 17th day of February, 1988.

I hereby certify that the foregoing
is a true copy of the original on file
in my office.

/s/ Stephen W. Townsend /s/ Stephen W. Townsend
Clerk of the Supreme Clerk of Supreme Court
Court of New Jersey

